80-393

Supreme Court, U. S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

No. _____ Term 1980

GERALD E. WALLS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Samuel J. Reich, Esquire
Gerard J. Koechel, Esquire
Attorneys for Petitioner,
Gerald E. Walls

Gefsky, Reich and Reich
1321 Frick Building
Pittsburgh, Pa. 15219
(412) 391-6222

QUESTIONS PRESENTED

I. WAS IT PERMISSIBLE FOR THE GOVERNMENT TO CROSS-EXAMINE PETITIONER ON ADMISSIONS MADE TO THE CASE AGENT WITHOUT PRODUCING OR DISCLOSING SAID STATEMENTS TO THE DEFENSE PRIOR TO THEIR USE AS REQUIRED BY RULE 16, FEDERAL RULES OF CRIMINAL PROCEDURE.

II. DID A FATAL VARIANCE EXIST BETWEEN THE CONSPIRACY INDICTMENT AND THE PROOF AT TRIAL, THEREBY REQUIRING RELIEF IN ACCORDANCE WITH THE HOLDING OF KOTTEAKOS V. UNITED STATES, 328 U.S. 750, 66 S. CT. 1239, 90 L. ED. 1557 (1946).

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OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit was rendered and entered June 11, 1980 (Appendix "A"), and, to the best of petitioner's knowledge, has not been printed or reported by any official or unofficial reporter. The Order denying petitioner's request for a rehearing was dated and entered on July 9, 1980 (Appendix "B"), and, to the best of petitioner's knowledge, has not been printed or reported by any official or unofficial reporter. The Order of the United States District Court for the Western District of Pennsylvania was rendered and entered on October 3, 1979 (Appendix "C"), and to the best of petitioner's knowledge,has not been printed or reported by any official or

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[1]Lawrence Victoria also appealed to the United States Court of Appeals for the Third Circuit jointly with petitioner at No. 79-2515. Victoria does not join in this appeal.

unofficial reporter. The Opinion of the United States District Court was rendered on October 4, 1979, and is attached as Appendix "D".

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was dated and entered June 11,1980. (Appendix "A"). The Order denying petitioner's request for rehearing was dated and entered July 9, 1980 (Appendix "B"). This Petition for Writ of Certiorari is timely filed within the sixty (60) day period proscribed by the Supreme Court Rules.

Jurisdiction of this Court is involved under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Rule 16 (a)(1)(A), Federal Rules of Criminal Procedure (Appendix "E").

Local Rule of Court 24 (Appendix "F").

STATEMENT OF THE CASE

Petitioner and seven (7) others were indicted by a federal grand jury in a seven (7) count indictment[2] on May 11, 1979. Petitioner was specifically charged in the First Count of the indictment with violating 18 U.S.C. §§472 and 473, conspiring to possess, receive, and deliver counterfeit obligations of the United States with intent to defraud. In the Second Count of the indictment petitioner and other defendants were charged with the possession of 740 federal reserve notes in $20 and $100 denominations knowing them to have been forged and counterfeited, in violation of 18 U.S.C. §472.

Jury trial began on August 6, 1979 and concluded on August 21, 1979. Of the

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[2] The seven others were Lawrence Victoria, Curtis Arthur Brown, James B. Brown, Kenneth King, Henry Rischitelli, George Turner, and W. William Winston.

co-defendants, Kenneth King and Henry Rischitelli pled guilty and testified on behalf of the Government. John Galayda, an unindicted co-conspirator, also testified for the Government. Petitioner was found guilty on both counts. Post trial motions for judgment of acquittal and/or new trial were timely filed by petitioner and a hearing was held. Said motions were denied and petitioner was sentenced to a three (3) year period of incarceration.

During the course of the trial, the Government called numerous witnesses to the stand to unravel a complicated scenario concerning the existence of the counterfeit bills in question, their travel to West Virginia where some were used in a cocaine transaction, and the efforts of the investigating authorities, both federal and local. The evidence is succinctly put forth as follows.

The Government's evidence against petitioner consisted primarily of the testimony of John Galayda, Henry Rischitelli, and the two case agents, Marvin Elder and Charles English of the United States Secret Service. Numerous witnesses were called by the Government to testify against the co-defendants, particularly those involved with the counterfeit $20 bills.

John Galayda, a convicted felon, plea bargained with the Government and became its main witness against Gerald Walls and Lawrence Victoria. Galayda, the first Government witness, stated that in the fall of 1978 Victoria produced six to seven thousand dollars worth of counterfeit $20 bills and told Galayda to throw them away in that they were "garbage." Instead of throwing the bills away, Galayda took them and gave them to Kenneth Robert King of

Morgantown, West Virginia, where the bills began appearing.

Galayda contacted George Turner from Morgantown in an effort to get the counterfeit bills back. Turner allegedly approached James B. Brown, also from Morgantown, who received the bills from King. In December, 1978, three thousand dollars worth of the counterfeit $20 bills were returned to Galayda by James B. Brown and George Turner.

Many Government witnesses detailed the route the bills took in Morgantown. King testified that while gambling in Morgantown, it was spotted that he was using the bogus money, so he burned the remaining bills he had. The next week, Willie Winston requested that King get some of the counterfeit for him. King received additional bills from Galayda and gave them to Winston.

Daniel Chips then testified that Willie Winston approached him in October,

1978 to arrange a purchase of marijuana and cocaine. On the arranged date, Winston and James B. Brown went to Chips' apartment in Morgantown where they paid $1,875 in counterfeit $20 bills for one ounce of cocaine. Three additional witnesses testified about this drug transaction. Sharon Walker, a friend of Winston who helped set up the drug deal, informed authorities as to these events.

Of the $3,000 worth of counterfeit money that Turner and James Brown returned to Galayda, $2,000 worth was given to James Frey of Uniontown, Pennsylvania by Galayda. Galayda also gave $500 worth to Curtis Brown and Milford "Nudie" Frye of Belle Vernon, Pennsylvania. Frye returned some of the bills to Galayda and Galayda attempted to sell them to James Frey and Special Agent Skip Ott of the United States Secret Service.

Galayda also testified that in December, 1978, he met with Gerald Walls and

Lawrence Victoria, at which time Walls showed them some counterfeit $100 bills. It was agreed upon at that meeting that Victoria would purchase counterfeit $100 bills from Walls at a later date.

Henry Rischitelli testified after John Galayda and also implicated Walls in the counterfeit $100 scheme. Rischitelli testified that in late January, 1979, he received $15,000 worth of the counterfeit $100 bills from Vincent Pecora in Irwin, Pennsylvania and sold them to Walls. In February, 1979, Walls received an additioral $20,000 worth of the bills. The counterfeit $100 bills came to the attention of the authorities when Rischitelli attempted to pass one at the Red Bull Inn in Charleroi, Pennsylvania. Rischitelli also admitted being the source of the counterfeit $20 bills in the Western Pennsylvania area, but he did not implicate Walls in this scheme.

The case against petitioner was primarily investigated by Special Agents

Marvin Elder and Charles English of the United States Secret Service. In late November, 1978, Elder was at a lounge owned by Walls in Uniontown, Pennsylvania. While there, Elder lost his wallet that contained his identification. Walls met with Elder to return the wallet, at which time counterfeit money was discussed and Walls denied any involvement. A second meeting was held on December 15, 1978, between Walls, Elder, and English. At this meeting, the agents sought Walls' cooperation with their investigation. Again, Walls denied any involvement in counterfeiting but he agreed to cooperate to any extent he was able. A third meeting between Walls and Elder occurred in April. By this time Walls was a prime suspect and Elder knew that he was close to being indicted. Elder again sought Walls' cooperation in the investigation. Elder further testified that at this April meeting Walls told

Elder that he was close to the source of the printer of the counterfeit and could get a million dollars worth. Walls' distrust for Galayda and Rischitelli was corroborated by the testimony of his wife, Diane Walls, and several other defense witnesses. They primarily testified that petitioner did not want to associate with Galayda because he no longer trusted him. On cross-examination, petitioner was also questioned about whether he told the agents at the December meeting that he was close to the printer and could get a million dollars worth of the bills. Walls denied making the statements.

ARGUMENT I

The issue of the prosecuting attorney's failure to disclose statements made by the petitioner to the case agent is directly covered by Rule 16 of the Federal Rules of Criminal Procedure and Local Rule of Court 24 as well. In the instant case, the failure to disclose is a blatant violation of the Federal Rules cited above and contrary to the holdings of several Courts of Appeals in differing circuits. Since this is an obvious violation of the rules and petitioner relies on cases of diverse circuits so holding, petitioner requests this Court to issue a writ of certiorari and review this matter.

To develop this argument it is necessary to briefly set forth the pertinent evidence adduced at trial. At trial, petitioner testified on his own behalf and denied any involvement with the counterfeit

currency in question. During cross-examination, the prosecuting attorney questioned petitioner about several meetings that he had with Special Agent Marvin Elder, the case agent from the United States Secret Service. The Assistant United States Attorney questioned petitioner as to statements in the form of admissions that petitioner allegedly made to Elder at a meeting in April, 1979.

The importance of this line of questioning requires that this portion of the cross-examination be presented verbatim:

> "Q. So that if you know that Larry Victoria and Henry Rischitelli and John Galayda and others were handling counterfeit bills, you would refuse to tell the government or the Court about it?
>
> A. First of all, I didn't know they had it if they did have it; and secondly, I would go get the money.
>
> No, I wouldn't. No, I wouldn't. I agree with you.

Q. And in fact --

A. Because a lot-- Go ahead. I'm sorry.

THE COURT: I guess this is all.

Ask the question.

Q. And in fact, didn't you tell the agents that you were close to the printer and that you felt that you could get into the printer and find out about these counterfeit bills for them?

A. No, I did not. That's a lie.

MR. REICH: If the Court please, while Mr. Crawford is pausing, Your Honor, may we approach the bench?" Tr. 1181. (emphasis added)

A lengthy sidebar discussion followed during which counsel for petitioner argued that despite appropriate pre-trial requests, no notice of even the existence of these statements was given to the defense. The defense objected to any cross-examination of petitioner on these admissions based upon the fact there was no prior production of said statements. In concluding the

sidebar discussion, the trial Court allowed this testimony to stand although it was agreed that the defense was not given notice of the statements. To compound the error, Agent Elder was permitted to testify, over counsel's objection, during the Government's rebuttal that petitioner did make these statements.

Petitioner contends that the Government failed in its duty to disclose these statements and that petitioner was severely prejudiced by the non-disclosure and use of the admissions. Federal Rule of Criminal Procedure 16(a)(1)(a) specifically provides that upon request of defendant the Government must disclose "the substance of any oral statement which the governement intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent." It must be noted

that pretrial rulings led the defense to believe that no statements of this nature existed. Through informal and formal means of discovery, petitioner requested that any statements made by him be revealed. Furthermore, Local Rule 24 requires automatic production of the statements.

The Government responded to petitioner's pretrial requests for disclosure by stating in Section II(B)(3) of the Government's Response to Defendant's Pre-Trial Motions that "All defendants' statements have been turned over to that defendant..." (Appendix G). In fact, the statements made by petitioner were not turned over by the Government and the nondisclosure is not disputed by the Government.

In addition to the Federal Rules of Criminal Procedure, the decision of the United States Court of Appeals for the Third Circuit to deny relief to petitioner is also in conflict with the holding of United

States v. Lewis, 511 f.2d 798 (2d Cir. 1975). In a highly similar situation, it was held in Lewis, supra, that "Discovery of the government's evidence of relevant and incriminating statements made by a defendant to police is of the utmost importance to the preparation for the defense..." Lewis, supra, 802. The Second Circuit decision further held that even when the statements are not recorded or reduced to writing, as in the instant case, the Government still has the obligation to produce them.

Thus, petitioner requests that this Court issue a writ of certiorari so that this issue may be more fully developed in briefs and argument. There was a blatant violation of Federal Rule of Criminal Procedure 16(A)(1) and petitioner was severely prejudiced by the improper use of these admissions. Furthermore, the Order of the United States Court of Appeals for the Third Circuit is in direct contrast to the holding of United States v. Lewis, supra.

Petitioner also relies on the holding of United States v. Mitchell, 613 F.2d 779 (10th Cir. 1980). In that particular case it was held that when an undisclosed statement by the Government is used in rebuttal there is still a violation of Rule 16, Federal Rules of Criminal Procedure.

ARGUMENT II

In the Indictment the Government charged petitioner with one count of conspiracy and one count of possessing counterfeit obligations of the United States with intent to defraud. Petitioner contends that there was a prejudicial and fatal variance between the allegations of the Indictment and the proof at trial in that the Government's evidence established the existence of at least two or more separate conspiracies. Petitioner now requests that an issue for a writ of certiorari be granted due to the inconsistent rulings that exist in the different Circuits on this issue.

Petitioner recognizes the case law holding that in instances where a variance is at issue, the defense must show; 1)- the variance between the charge of conspiracy and the proof of several separate conspiracies; and 2)- the variance affects

the substantial rights of the defendant. Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Petitioner submits that the Government's evidence, considered in the view most favorable to the Government established the existence of a minimum of two (2) separate conspiracies; one and possibly several smaller conspiracies for the distribution of counterfeit $20 bills in Western Pennsylvania and West Virginia, and the other for the distribution of counterfeit $100 bills.

During the course of the trial it was brought out by Government witnesses that the counterfeit $20 bills were given to John Galayda by Lawrence Victoria and were evidently transported to West Virginia where they were used in gambling games and cocaine transactions. At no time did any witness link petitioner with these counterfeit $20 bills.

However, petitioner was linked to the counterfeit $100 bills. Government

witnesses testified that petitioner received approximately $35,000 worth of counterfeit $100 bills. The conspiracy involving the $100 bills consisted of Vince Pecora, Henry Rischitelli, Lawrence Victoria, John Galayda and petitioner. There were many more participants in the conspiracy involving the counterfeit $20 bills. Primary Government witness, John Galayda, testified that the schemes involving the counterfeit $20 bills and counterfeit $100 bills were completely separate matters.

Thus, petitioner was unfairly harmed by having attributed to him the crimes of a conspiracy of which he had no part. Specifically there was evidence of drug transactions where weapons were involved and the counterfeit $20 bills were used. Petitioner was never linked to any of these events and such testimony is inherently prejudicial to petitioner.

Petitioner asserts that the facts in the instant case are comparable to those of United States v. Durades, 607 F.2d 818 (9th Cir. 1979), and United States v. Miley, 513 F.2d 1191 (2d Cir. 1975) in which it was held that multiple conspiracies were shown to have existed. The length of of the trial, in which the chain of custody for the counterfeit $20 bills was painstakingly established and the testimony concerning the cocaine purchase served great prejudice to petitioner when there was no testimony linking petitioner to those events.

As stated by the Court in Kotteakos:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." Kotteakos v. United States, supra, 1252.

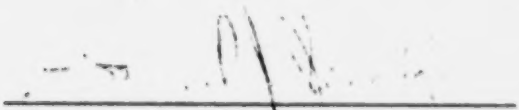
In conclusion, petitioner asserts that an issue for a writ of certiorari

should be granted in this matter due to the failure of the United States Court of Appeals for the Third Circuit to rule in accordance with Kotteakos, supra, and the other case law cited.

CONCLUSION

WHEREFORE, on the basis of the foregoing reasons it is hereby requested that this Honorable Court issue a writ of certiorari and review the instant matter.

Respectfully submitted,



Samuel J. Reich
Gerard J. Koechel,
Attorneys for Petitioner

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

THOMAS F. QUINN
CLERK

TELEPHONE
215-597-2995

June 11, 1980

Samuel J. Reich, Esquire
Gerard J. Koechel, Esquire
Gefsky, Reich and Reich
1321 Frick Building
Pittsburgh, Pennsylvania 15219

Harold Gondelman, Esquire
Gondelman, Baxter, Mansmann
and McVerry
6th Floor - Porter Building
Pittsburgh, Pennsylvania 15219

Frederick W. Thieman, Esquire
Assistant U. S. Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, Pennsylvania 15219

Re: U.S.A. vs. Curtis Arthur Brown, etc., et al.; Gerald E. Walls, Appellant in 79-2444 and Lawrence Albert Victoria, Appellant in 79-2515
Nos. 79-2444 and 79-2515

Gentlemen:

Enclosed herewith is conformed copy of judgment-order entered by the Court today in the above-entitled case.

Very truly yours,

Thomas F. Quinn

T. F. Quinn, Clerk

sdw
Enclosure

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2444

UNITED STATES OF AMERICA

v.

CURTIS ARTHUR BROWN, a/k/a Meatball, JAMES B. BROWN, a/k/a JB, KENNETH ROBERT KING, HENRY RISCHITELLI, GEORGE TURNER, a/k/a Cadillac George, LAWRENCE ALBERT VICTORIA, GERALD WALL, a/k/a Snooky, WILLIAM W. WINSTON

Gerald E. Walls
Appellant

(D.C. Crim. No. 79-00099-07)

No. 79-2515

UNITED STATES OF AMERICA

v.

CURTIS ARTHUR BROWN, a/k/a Meatball, JAMES B. BROWN, a/k/a JB, KENNETH ROBERT KING, HENRY RISCHITELLI, GEORGE TURNER, a/k/a Cadillac George, LAWRENCE ALBERT VICTORIA, GERALD WALL, a/k/a Snooky, WILLIAM W. WINSTON

Lawrence Albert Victoria
Appellant

(D.C. Crim. No. 79-00099-06)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
June 10, 1980
Before: GIBBONS, WEIS and SLOVITER, Circuit Judges

APPENDIX "A"

SAMUEL J. REICH, ESQ.
GERARD J. KOECHEL, ESQ.
1321 Frick Building
Pittsburgh, Pa. 15219

Attorneys for Appellant
Lawrence Albert Victoria

HAROLD GONDELMAN, ESQ.
GONDELMAN BAXTER MANSMANN
and MC VERRY
6th Floor, Porter Building
Pittsburgh, Pa. 15219

Attorneys for Appellant
Gerald E. Walls

ROBERT J. CINDRICH
United States Attorney
SANDRA D. JORDAN
Assistant United States Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, Pa. 15219

Attorneys for Appellee

JUDGMENT ORDER

In these consolidated appeals from judgments of sentence following convictions of criminal conspiracy and of possession of counterfeit obligations, and in Victoria's case of conviction of delivery receipt and transfer of counterfeit money, the defendant Walls contends:

1. that the trial court erred in allowing cross examination respecting his oral statements to a case agent not disclosed to the defense in pretrial discovery;

2. that the trial court should have granted a mistrial when witnesses Galayda and Rischitelli volunteered that they had taken polygraph examinations;

3. that there was a fatal variance from the indictment in that the government's proof established two rather than a single conspiracy;

4. that the trial court erred in its charge respecting multiple conspiracies;

5. that the trial court erred in admitting hearsay testimony by Special Agent English.

In addition to the foregoing contentions, defendant Victoria contends:

1. that the trial court erred in admitting irrelevant and prejudicial evidence in the testimony of Herbert Guydon;

2. that the trial court erred in permitting cross examination and rebuttal testimony about unrelated criminal activity;

3. that the trial court erred in failing to grant a mistrial when the prosecutor suggested that Victoria had threatened an acquaintence of a government witness;

4. that there is insufficient evidence of Victoria's participation in a conspiracy.

We find no reversible error.

It is O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed.

BY THE COURT,

Circuit Judge

Attest:

Thomas F. Quinn, Clerk

DATED: JUN 1 : 1990

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2444

UNITED STATES OF AMERICA,
Appellee

v.

GERALD E. WALLS,
Appellant

SUR PETITION FOR REHEARING

Present: Hon. Collins J. Seitz, Chief Judge, Hon. Ruggero J. Aldisert, Hon. Arlin M. Adams, Hon. John J. Gibbons, Hon. Max Rosenn, Hon. James Hunter, III, Hon. Joseph F. Weis, Jr., Hon. Leonard I. Garth, Hon. A. Leon Higginbotham, Jr., Hon. Dolores K. Sloviter, Circuit Judges.

The petition for rehearing filed by the appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Jon J. Gibbons
Judge

Dated: July 9, 1980

APPENDIX "B"

United States of America vs.

United States District Court for

DEFENDANT: (7) GERALD WALL, a/k/a Snooky

WESTERN DISTRICT OF PENNSYLVANIA

DOCKET NO. 79-099

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: October; DAY: 3; YEAR: 1979

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Samuel J. Reich, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of { [ ] NOT GUILTY. Defendant is discharged; [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of Count 1 - wilfully and knowingly combining, conspiring, confederating, and agreeing together and with others to commit offenses against the U.S. (18 USC & 371)

Count 2 - with intent to defraud, possessing and concealing forged and counterfeited (18 USC 472 & 2)

As to Count

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years.

As to Count 2 the defendant is committed to the custody of the Attorney General for imprisonment for a period of three (3) years to run concurrent with count 1. No fine. No costs.

Upon the imposition of sentence following conviction defendant was advised of his right of appeal and his right to counsel on appeal.

SPECIAL CONDITIONS OF PROBATION

The defendant shall report to the United States Marshal on Monday, October 29, 1979 at 1:00 p.m. to commence sentence. If an appeal is filed, defendant is continued on bond pending appeal.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATIONS

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Gerald J. Weber

Date October 3, 1979

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal Action No. 79-099
	)	
CURTIS ARTHUR BROWN, a/k/a Meatball	)	
JAMES B. BROWN, a/k/a J.B.	)	
LAWRENCE ALBERT VICTORIA	)	
GERALD WALLS, a/k/a Snooky	)	
W. WILLIAM WINSTON	)	

O P I N I O N

WEBER, C. J. October 4 1979.

On August 6, 1979, a jury trial commenced in the above action. Subsequently, on August 21, 1979, the jury returned their verdict. Curtis Arthur Brown was found guilty of receiving and possessing counterfeited obligations of the United States, with intent to defraud, in violation of 18 U.S.C. §§ 472, 473, and 2. James B. Brown was found guilty of possessing counterfeited obligations of the United States with intent to defraud, in violation of 18 U. S. C. §§ 472 and 2. Lawrence Albert Victoria was found guilty of conspiracy, receiving, possessing and delivering counterfeited obligations of the United States, with intent to defraud, in violation of 18 U. S. C. §§ 371, 472, 473 and 2. Gerald Walls was found guilty of conspiracy and possessing counterfeited obligations of the United States, with intent to defraud, in violation of 18 U.S.C. §§ 371, 472 and 2. W. William Winston was found guilty of possessing counterfeited obligations of the United States, with intent to defraud, in violation of 18 U. S. C. §§ 472 and 2.

Defendants James B. Brown, Lawrence Albert Victoria, Gerald Walls and W. William Winston have filed Motions for Acquittal and/or New Trial. The motions raise a number of grounds, many of which were asserted and ruled upon during trial and/or during the numerous conferences with counsel. Nonetheless,

for the benefit of the record and in view of certain determinations made by the jury in their deliberations on the various counts of the indictment, we shall address the issues once again.

JAMES B. BROWN
MOTION FOR JUDGMENT OF ACQUITTAL AND/OR NEW TRIAL

Defendant Brown raises two grounds in support of his motion. He claims that the court erred in denying his motion for judgment of acquittal made at the close of the entire case because there was no evidence that he actually possessed counterfeit within the Western District of Pennsylvania. Additionally, he claims that the court erred in its method of jury selection by limiting each defendant to two challenges and by requiring defendants to exercise the challenges "blindly".

As noted, defendant Brown was charged with possessing counterfeited obligations of the United States with intent to defraud. He was tried as a principal under 18 U.S.C. § 2, which provides, in relevant part:

> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

There is clear evidence on this record that defendant Brown caused a quantity of counterfeit to be delivered to John George Galayda in West Virginia. We believe that this conduct is sufficient to sustain a charge against defendant Brown as a principal, given Brown's knowledge that Galayda was a resident of the Western District of Pennsylvania and was engaged in distribution of counterfeit money. See, Pinkerton v. United States, 328 U. S. 640 (1946).

With regard to the jury selection procedure, the court notes that neither the method nor the number of peremptory challenges is constitutionally secured. See, Swain v. Alabama, 380 U. S. 202 (1965); and United States v. Turner, 558 F. 2d 535 (9th Cir. 1977). According to

Fed. R. Cr. P. 24(b)(2)(b) the court has discretion, in multiple defendant cases, to grant or deny additional challenges and/or to permit such challenges to be exercised separately or jointly. In this case we allowed defendants two additional challenges so that an even number of challenges could be exercised by each defendant. The defendants actually conferred among themselves before exercising their challenges. Moreover, the method of exercising such challenges is within the discretion of the trial judge. 8 MOORE'S ¶ 24.04. The method used here is the method that has been followed by this member of the court for several years, in both civil and criminal cases. Therefore, in this case involving multiple defendants the granting of additional challenges was permissive, not mandatory. We believe that our decision to allot 12 peremptory challenges to all defendants allowing two peremptory challenges to each was proper. See, United States v. Anderson, 562 F.2d 394 (6th Cir. 1977); United States v. Haldeman, 559 F. 2d 31 (D.C. Cir. 1976.

Therefore, defendant Brown's motions will be denied.

LAWRENCE ALBERT VICTORIA
MOTION FOR JUDGMENT OF ACQUITTAL, OR IN THE ALTERNATIVE, FOR A NEW TRIAL.

Defendant Victoria raises a number of separate grounds in support of his motion. This defendant also claims error in the jury selection method in common with the other defendants. As noted in our discussion of defendant James B. Brown's motion, however, we believe that the procedure to be within our discretion and proper under the circumstances. Defendant Victoria then claims that the verdict was against the law and the evidence. We find no merit in these general contentions.

Defendant Victoria charges that the court erred when it permitted the case to be submitted to the jury on the theory of a single conspiracy. As we held during trial and at the various conferences with counsel, we do not believe that the existence of separate conspiracies, rather

than a single conspiracy as charged in this indictment, is a fatal variance. The government is not precluded from charging a master conspiracy in a single indictment and then establishing at trial, that under the master conspiracy, there were more than one subsidiary schemes. See, United States v. Kenny, 462 F. 2d 1205 (3rd Cir. 1972). On the evidence in this case, the jury could have and evidently did find that the defendants were united in a common scheme. See, United States v. Ellis, 595 F.2d 154 (3rd Cir. 1979), citing Blumenthal v. United States, 332 U. S. 539 (1947), and United States v. Kenny, supra. We do not believe that our ruling on this issue prejudiced the "substantial rights" of the defendants. United States v. Miley, 513 F. 2d 1191 (2nd Cir. 1975).

Defendant Victoria claims that the court erred in refusing to grand a mistrial when certain witnesses referred to their having taken lie detector tests. In this case the witness offered an unsolicited statement regarding the use of a polygraph. There was no testimony as to the results of such an examination. We found no prejudicial effect on the jury and, therefore, had no reason to grant a mistrial at the time. See, United States v. Wyant, 576 F. 2d 1312 (8th Cir. 1978).

Defendant charges that the court again erred in refusing to grant a mistrial or rebuke government counsel for making a "gratuitous comment" with respect to a certain exhibit. In our estimation, the comments made by the Assistant United States Attorney cannot be grounds for a new trial in this case as they were arguments on the admissibility of certain documents as evidence which the court had previously excluded. See, United States v. Ellis, supra.

Defendant Victoria asserts that the court was incorrect in failing to charge the jury that evidence of good character, if believed, could alone cause a reasonable doubt as to guilt. The court is of the opinion that the law in this regard was fairly and adequately covered by the instructions. Nonetheless, we note that

such an instruction need not be given in every case in which evidence of good character is admitted. See, Oertle v. United States, 370 F.2d 719 (10th Cir. 1966). Defendant also claims, more generally, that the court erred in certain of its other instructions to the jury. As stated in Smith v. Pressed Steel Tank Co., 66 F.R.D. 429 at 433 (E.D. Pa. 1975):

> A party has no vested interest in any particular form of instruction; the language of the charge is for the Court to determine. The Court is not bound to give any instruction in the exact language submitted. If from the entire charge ... it appears to the Court, ... that the jury has been fairly and adequately instructed, then the requirements of the law are satisfied.

We are confident that the language of our charge adequately stated the law in this case.

Finally, defendant Victoria charges that certain items of evidence should not have been admitted during trial. The court will not attempt at this time to reiterate the reasons given for the rulings made during trial. Rather, we will rely on our prior rulings as they will appear of record.

Therefore, defendant Victoria's motion will be denied.

GERALD WALLS
MOTION FOR JUDGMENT OF ACQUITTAL AND/OR FOR A NEW TRIAL

Defendant Walls, in support of his motion, claims that the court erred in submitting the case to the jury under the theory of a single conspiracy. We have addressed this alleged defect previously in this Opinion. It will suffice to say here, however, that we find no fatal variance between the allegations of the indictment and the proof at trial. We do not believe that Walls was prejudiced by our failure to sever his trial from the other defendants herein. See, United States v. Miley, supra.

Defendant Walls also charges that the court erred in its method of jury selection; in not granting a mistrial due to testimony concerning a polygraph examination; in its conduct of the closing arguments; in refusing various requests for instructions to the jury; and in failing to otherwise give a proper charge. We refer Walls to our previous discussion of these issues in this Opinion.

Defendant asserts that the court was in error in allowing testimony as to the movement of counterfeit money in the Western District of Pennsylvania from August 1978 through June 1979. The court notes that the admission of the movement of counterfeit in the District into evidence, although not proved to be connected with the conspiracy, is proper to negate theories of innocent possession and/or coincidence. See, United States v. Rizzo, 492 F.2d 443 (2nd Cir. 1974); and Carrullo v. United States, 184 F. 2d 743 (8th Cir. 1959). We believe that the evidence admitted in accordance with our ruling was properly limited to the counterfeit money attributable to particular printings in this case identified by Secret Service circular numbers involved or related to those in evidence in this case.

Finally, defendant Walls alleges that the court erred in allowing Special Agent Marvin Elder to testify, in rebuttal, as to oral statements allegedly made by Gerald Walls on December 15, 1978 and in April, 1979. Defendant claims that notice was not provided to defense counsel that such statements were in written form or, indeed, that they would be used at trial. Defendant asserts this was a violation of Fed. R. Crim. P. 16(a)(1)(a), and Local Rule 24.

Apparently, Agent Elder did not make any contemporaneous notation or report of the comments made by Walls during their April meeting because he did not believe the statements were serious or credible. The Agent did reduce his recollections to writing, however, in preparation for trial. During a side-bar conference on an objection by Walls' counsel, Agent Elder testified that he had made all of his notes of the meeting available for inspection by counsel. Defense counsel denied having access to the notes of the April meeting.

The Court is unable to discern whether the notes of the April meeting were included in the case file and disclosed to defense counsel, as indeed they should have been, pursuant to Fed. R. Crim. P. 16 and Local Rule 24. Nonetheless, we note that the statements offered by the Agent were in the nature of rebuttal to Walls' earlier account of the April meeting. The statements were not offered by the government as confessions or substantive evidence, but as attacks on the creditibility of Walls. The statements were cryptic and equivocal. While they admit of some knowledge of criminal activity they cannot reasonably be construed as admissions to the offenses charged in the indictment. Moreover, we do not believe that the statements were prejudicial to defendant, given the presence of other substantial evidence of his involvement in the activities charged in the indictment.

Therefore, defendant Walls' motions will be denied.

W. WILLIAM WINSTON
MOTION FOR JUDGMENT OF ACQUITTAL AND/OR FOR A NEW TRIAL

Defendant W. William Winston claims that the court erred in denying his motion for judgment of acquittal made at the end of the case because there is no evidence that he performed any act within the Western District of Pennsylvania. Therefore, he maintains that this court lacks jurisdiction.

Defendant was originally charged by indictment with conspiracy and possessing counterfeited obligations of the United States with intent to defraud. The jury acquitted him on the conspiracy charge, but found him guilty of possession. Given the jury's determination, this court would have venue only if defendant was punishable as a principal within this district. 18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

We do not believe, under this definition, that W. William Winston can be held as a principal in the offense charged. There is no evidence on this record that defendant committed any offense within the Western District of Pennsylvania. The record in this case does indicate that defendant Winston and defendant James B. Brown had a meeting in West Virginia with Kenneth Robert King. During the course of this meeting, defendant Winston indicated to Mr. King that he was interested in securing a supply of counterfeit. Mr. King advised that he would check his source to see what was available, but he did not indicate that the source was located in Pennsylvania.

When King ultimately secured the counterfeit in Pennsylvania, he returned to West Virginia and gave it to defendant Winston.

On these facts defendant Winston could not be found to have "wilfully caused" this act to be done in the Western District of Pennsylvania. We find defendant's connection with this District to be too remote or coincidental to support venue in this District.

Therefore, defendant Winston's motion for judgment of acquittal will be granted, and the indictment against him will be dismissed.

ORDERED filed this 4 day of October, 1979, pursuant to our Order of October 3, 1979.

GERALD J. WEBER
Chief United States District Judge

cc: Thomas Crawford
Assistant United States Attorney

Lloyd Engle, Esq.
1512 Frick Building
Pittsburgh, PA 15219

Raymond Yackel, Esq.
829 Monongahela Building
Morgantown, W. Va. 26505

Stanley Greenfield, Esq.
728 Fifth Avenue
Pittsburgh, PA 15219

Bernard Markovitz, Esq.
5th Floor, Manor Building
Pittsburgh, PA 15219

Samuel J. Reich, Esq.
1321 Frick Building
Pittsburgh, PA. 15219

APPENDIX "D"

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

APPENDIX "E"

LOCAL RULE OF COURT

RULE 24. CRIMINAL ACTIONS

1. After a case has been listed for trial, it shall not be continued except for just cause.

2. Motions under Rule 12 and Rule 41(e) of the Federal Rules of Criminal Procedure shall be made either before a plea is entered or within ten days after arraignment, unless the court extends the time either at arraignment or upon written application made within the said ten day period. Such application shall set forth the grounds upon which it is made and shall be served on the United States Attorney. The court, in its discretion, may, however, for good cause shown, permit a motion to be made and heard at a later date.

3. A defendant entering a plea of guilty at his arraignment shall be sentenced within a reasonable time thereafter at a date to be fixed by the court.

4. Pretrial Discovery and Inspection.

(a) Within five (5) days after the arraignment the United States Attorney and the defendant's counsel shall confer and, upon request, the government shall:

(1) Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(2) Permit defendant's attorney to inspect and copy or photograph any

relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government.

(3) Permit defendant's attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury.

(4) Permit defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which is the property of the defendant and which are within the possession, custody or control of the government.

(5) Permit defendant's attorney to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record.

(6) Permit defendant's attorney to inspect, copy or photograph any evidence favorable to the defendant.

(b) If, in the judgment of the United States Attorney, it would not be in the interests of justice to make any one or more disclosures set forth in paragraph (a) and requested by defendant's counsel, disclosure may be declined. A declination of any requested disclosure shall be in writing, directed to defendant's counsel, and signed personally by the United States Attorney, and shall specify the types of disclosures that are declined. If the defendant seeks to challenge the declination, he shall proceed pursuant to subsection (c) below.

(c) Additional Discovery or Inspection. If additional discovery or inspection is sought, defendant's attorney shall confer with the appropriate Assistant United

States Attorney within ten (10) days of the arraignment (or such later time as may be set by the court for the filing of pretrial motions) with a view to satisfying these requests in a cooperative atmosphere without recourse to the court. The request may be oral or written and the United States Attorney shall respond in like manner.

(d) In the event defendant thereafter moves for additional discovery or inspection, his motion shall be filed within the time set by the court for the filing of pretrial motions. It shall contain:

(1) the statement that the prescribed conference was held;

(2) the date of said conference;

(3) the name of the Assistant United States Attorney with whom conference was held; and

(4) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of defendant's motion.

(e) Any duty of disclosure and discovery set forth in this Rule is a continuing one and the United States Attorney shall produce any additional information gained by the government.

(f) Any disclosure granted by the government pursuant to this Rule of material within the purview of Rules 16(a)(2) and 16(b), Federal Rules of Criminal Procedure, shall be considered as relief sought by the defendant and granted by the court.

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APPENDIX "F"

GOVERNMENT'S RESPONSE TO DEFENDANT'S PRE-TRIAL MOTIONS

II. MOTIONS FOR DISCOVERY AND INSPECTION

A. Pursuant to Rule 16, Federal Rules of Criminal Procedure, defendant Victoria requests a number of items of discovery. The government intends to be governed by Rule 16 in making such discovery materials available.

1. As Mr. Victoria and his wife have threatened government witnesses, the government respectfully declines to reveal the names of government witnesses. No witnesses have given exculpatory testimony concerning defendant Victoria.

2. Criminal records will be disclosed at the time the witness testifies. The defendant's criminal record has been disclosed and the co-defendant's criminal records have been disclosed to them.

3. Any plea bargains or other deals made with witnesses will be disclosed when the witness testifies.

4. Grand jury transcripts and witness' statements will be revealed in accordance with Title 18, United States Code, Section 3500. The prosecutor's remarks were not transcribed, nor were witnesses' testimony.

5. Victoria apparently received no money from Galayda for the $7,000.00 worth of counterfeit $20.00 Federal Reserve Notes. The government has no knowledge as to whether this factor would externate or mitigate the crime.

6. The fingerprint report is the only scientific report to be presented other than the agent's determination of the counterfeit nature of the bills.

7. The names and addresses of co-conspirators are all a public records in the related case files available from the Clerk of Courts. Other, as yet, unindicted co-conspirators will not be revealed without a reasop for such disclosure.

APPENDIX "G"

B. Through counsel, defendant James Brown filed several motions fn the nature of discovery motions.

1. The government respectfully declines to furnish a list of thè witnesses in this case. Witnesses have been threatened and the government feels that such a practice would merely lead to more threats beingmade to other witnesses.

2. The government will reveal all felony convictions, known to the government, of witnesses when they testify.

3. All defendants' statements have been turned over to that defendant, co-defendant's statements will be turned over only to the declarant in accordance with Rule 16, Federal Rules of Criminal Procedure.

4. Counsel may inspect, but not photograph or copy, all counterfeit bills passed by the government relating to this case, for analysis, and expert opinion. Samples will not be furnished.

C. Defendant George Turner through counsel requested several items of discovery in several motions.

1. No mail cover was utilized in the investigation of this case.

2. The government will reveal all witnesses' statements in accordance with Title 18,United States Code, Section 3500.

3. The government has no jury list and cannot disclose information conterning jurors.

4. As previously indicated, the government respectfully declines to produce a witness list.

5. All government agents preserve their handwritten notes. Such notes will be produced if and when the agent may be called to testify regarding their contents.

6. The government respectfully objects to a pre-trial

hearings to determine the sufficiency of the evidence against defendant Turner. See Costello v. United States, 350 U.S. 359, 362-364 (1956).

7. There were no transcriptions of grand jury testimony in this case. The number of concurring grand jurors is a matter of public record.

8. The government knows of no exculpatory materials available to the defendant in this case.

9. All statements of Turner to government agents have been turned over to counsel, as has Mr. Turner's criminal record as known by this office.

10. Turner or counsel may inspect all physical and documentary evidence to be used in this case, as well as all scientific tests conducted.

11. There has been no electronic surveillance in this case. Recordings were made of calls to Turner by Galayda with Galayda's consent. Turner has been given a copy of such materials.

12. The government respectfully declines to disclose the identities of informants in this case.

13. The government will reveal any and all promises and deals made with witnesses when such witness may testify.

III MOTIONS TO SEVER

A. Defendant James B. Brown wishes to be granted a severance because he feels that he may be prejudiced by evidenc produced against his co-conspirators, and because the jury may become confused. Defendant is one of several individuals involved in a large scale counterfeit currency passing ring. He was, according to the government's evidence, one of the more significant schemers.

APPENDIX "G"